

BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

ROBERT E. and HELEN M. WISWALL,	)	
	)	
Appellants,	)	SHB No. 90-37
	)	
v.	)	
	)	FINAL FINDINGS OF FACT,
CLARK COUNTY and STATE OF	)	CONCLUSIONS OF LAW AND
WASHINGTON, DEPARTMENT OF	)	ORDER
ECOLOGY,	)	
	)	
Respondents.	)	

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This matter, the appeal of the denial of a shoreline variance permit to build a single family residence, came on for formal hearing before the Board on Thursday, April 11, 1991, at Vancouver, Washington. Present for the Board were Members: Harold S. Zimmerman, Presiding; Judith A. Bendor, Chair; Annette S. McGee, Nancy Burnett, Mark Erickson and Martin Carty.

Attorney Richard T. Howsley of Landerholm, Memovich, Lansverk and Whitesides, Inc., represented appellant Robert D. and Helen M. Wiswall. Deputy Prosecuting Attorney Richard S. Lowry represented respondent Clark County. Assistant Attorney General Kerry O'Hara, represented respondent State of Washington Department of Ecology.

The proceedings were recorded by Tami Kern, court reporter with Archer & Archer Court Reporters, Longview and Vancouver, Washington.

Witnesses were sworn and testified. Exhibits A-1 through A-3b

1 and R-1 through R-26 were stipulated, admitted and examined. Opening  
2 and closing arguments were made. From the testimony heard, exhibits  
3 examined and counsels' contentions, the Board makes the following:

4 FINDINGS OF FACT

5 I

6 Robert and Helen Wiswall own a residence and real property at  
7 10009 SE Evergreen Highway, east of Vancouver, in Clark County. This  
8 residence is contiguous to other undeveloped real property owned by  
9 the Wiswalls. It is this contiguous real property that is the subject  
10 of this appeal.

11 The Wiswalls have architectural plans to build a one-story  
12 residence on the subject property entirely within the 100-foot  
13 shoreline setback. The house would be approximately 12 feet back from  
14 the shoreline bluff and ordinary high water mark.

15 II

16 The subject property is located in a Conservancy Environment as  
17 designated in the Clark County Shoreline Management Master Program,  
18 adopted in August 1974. The property's location within 200 feet of  
19 the Columbia River places it in a Shoreline of Statewide Significance  
20 under the Shoreline Management Act, Chapt. 90.58 RCW.

21  
22 The subject property is south of a railroad right of way and lies  
23 wholly within 100 feet of the ordinary high water mark. Under the  
24  
25  
26

1 Clark County Shoreline Master Program, in the Conservancy  
2 no buildings are allowed within this 100-foot setback abse  
3 shoreline variance permit.

4 III

5 The Wiswalls' properties are adjacent to the Columbia  
6 the south and the Burlington Northern Railway right of way  
7 north. There is an access easement along the north side o  
8 properties and a permit for an existing 16-foot road cross  
9 railroad tracks at Ellsworth. This provides a driveway to  
10 existing home and the abutting subject property to the west

11 IV

12 The subject piece of property, designated as "1/60" o  
13 assessor rolls, was purchased in 1985 by Robert Wiswall and  
14 (Barney) Anthony as part of a larger parcel. This larger  
15 from the River across the railroad right of way.

16 Within about a year both men suffered heart attacks,  
17 entire property, including land north of the railroad right  
18 was sold to Wiswall's son. The son gave the senior Wiswall  
19 claim deed for the portion of the property south of the t  
20 payment for his interest in the larger parcel. The quit c  
21 was not recorded. Currently the senior Wiswall does not h  
22 ownership in the property north of the railroad tracks. T  
23 continue to own the property at 10009 SE Evergreen Highway  
24  
25  
26

1 the railway right of way, where they live. The son, however, is  
2 paying the taxes on the western property both north and south of the  
3 tracks.

4 A residence clearly could be built on the property north of the  
5 railway tracks, and be outside the shoreline setback. However the  
6 senior Wiswalls do not currently own this property.

7 V

8 The proposed house could be served by the Vancouver sewer system  
9 and Clark County Public Utility District electrical power. The site  
10 is zoned residential 1-10 single family. The proposed site is  
11 designated in the Clark County Comprehensive Plan as Single Family  
12 Residential with a minimum lot size of 10,000 square feet. The  
13 subject property south of the railway right of way is approximately  
14 8,500 square feet.

15 VI

16 A Determination of Nonsignificance was issued by Clark County  
17 March 20, 1990, for the proposed residence shoreline permit.

18 VII

19 There was no evidence submitted which showed threatened or  
20 endangered species of fish or wildlife concentrated on the subject  
21 property and there are no nesting sites there. Shoreline vegetation,  
22 grasses, blackberry vines, cottonwood, and other species provide  
23 filtering for water runoff and help maintain water quality. We find  
24  
25  
26

1 there is no significant impact on wildlife at this site. Construction  
2 activity that close to the shoreline could have some incremental or  
3 cumulative effect on wildlife habitats. Wildlife experts advise a  
4 100-200 foot setback in such environments.

5 At the hearing the residence was proposed to be outside the  
6 floodway. As so proposed, we find that the project alone would not  
7 have an adverse impact on flooding. There is no evidence that the  
8 proposed house would negatively impact views.

#### 9 VIII

10 Denial of the variance clearly prevents the construction of a  
11 house on the subject property. It cannot be developed without a  
12 variance. The property could be used as an additional yard for the  
13 Wiswalls' present house on the adjacent lot and for other recreational  
14 uses, such as picnicking, as well as some form of agriculture.

15 *The separation of the subject property in its present*  
16 *dimensions from the large lot is a cause of the hardship*  
17 *and is due to the applicants' own actions. The applicant*  
18 *could have included in the subject property sufficient*  
*land north of the railroad tracks to allow construction*  
*of a house thereon outside the 100 foot buffer area.*

#### 19 IX

20 Other than the existing Wiswall residence, there are few  
21 residences within the setback for a considerable distance on either  
22 side of the proposed Wiswall development.

23 There have been few applications for shoreline setback variances  
24 on properties between Vancouver and this area in the past 20 years.

1 The last two years have seen an increased interest. Development  
2 activity along the river has grown appreciably with construction of  
3 new subdivisions east to 164th Avenue, which is west of Camas.

4 In 1979, Clark County did issue a shoreline variance permit to  
5 Steven L. Huff for a residence within the shoreline setback, adjacent  
6 to the Wiswalls' residence on the west. However no building permits  
7 were issued; nothing was built, and the shoreline permit expired.

8 X

9 We find that widespread development within the 100 foot setback  
10 along the Columbia River, that close to the shoreline, is likely to  
11 have an adverse cumulative effect on wildlife. Shoreline habitat  
12 would be diminished. Shoreline vegetation provides filtration for  
13 water runoff, thereby maintaining water quality. Testimony from the  
14 wildlife expert supports a 100-foot setback.

15 We find that there would be some adverse cumulative impacts if  
16 variances were granted for other like projects within the setback.

17 XI

18 Any Conclusion of Law deemed to be a Finding of Fact is hereby  
19 adopted as such.

20 From these Findings of Fact, the Board makes these:

21 CONCLUSIONS OF LAW

22 I

23 The Shoreline Hearings Board has jurisdiction in the instant  
24  
25  
26

1 case. Chapt. 90.58 RCW.

2 II

3 The Board reviews the proposal for consistency with the Clark  
4 County Shoreline Master Program (SMP) and the Shoreline Management Act  
5 (Chapt. 90.58 RCW). The burden is on the appellant to prove that a  
6 shoreline variance permit should issue.

7 III

8 Some of the issues in this case are whether the variance criteria  
9 of WAC 173-14-150 have been met. Appellant has to demonstrate that  
10 all of the criteria have been met.

11 The policies of the Shoreline Management Act, at RCW 90.58.020,  
12 for Shorelines of Statewide Significance also have to be met.

13 The Clark County Shoreline Master Program also governs the  
14 appeal, in particular the policies and regulations for the Conservancy  
15 Environment and Residential Development.

16 IV

17 WAC 173-14-150 states in pertinent part:

18 The purpose of a variance permit is strictly limited to  
19 granting relief from specific bulk, dimensional or  
20 performance standards set forth in the applicable master  
21 program where there are extraordinary or unique  
22 circumstances relating to the property such that the strict  
23 implementation of the master program will impose  
24 unnecessary hardships on the applicant or thwart the  
25 policies set forth in RCW 90.58.020. [Emphasis added.]  
26 [...] (2) Variance permits for development that will be  
27 located landward of the ordinary high water mark [...] may  
be authorized provided the applicant can demonstrate all of  
the following: [Emphasis added.]

1 (a) That the strict application of the bulk, dimensional  
2 or performance standards set forth in the applicable master  
3 program precludes or significantly interferes with a  
4 reasonable use of the property not otherwise prohibited by  
5 the master program;

6 (b) That the hardship above is specifically related to the  
7 property, and is the result of the unique conditions such  
8 as irregular lot shape, size, or natural features and the  
9 application of the master program, and not, for example,  
10 from deed restrictions or the applicant's own actions;

11 (c) That the design of the project is compatible with other  
12 permitted activities in the area and will not cause adverse  
13 effects to adjacent properties or the shoreline environment;

14 (d) That the requested variance does not constitute a grant  
15 of special privilege not enjoyed by the other properties in  
16 the area, and is the minimum necessary to afford relief;

17 (2)(e) That the public interest will suffer no substantial  
18 detrimental effect.

19 [...]

20 (4) In the granting of all variance permits, consideration  
21 shall be given to the cumulative impact of additional  
22 requests for like actions in the area. For example if  
23 variances were granted to other developments in the area  
24 where similar circumstances exist the total of the  
25 variances shall also remain consistent with the policies of  
26 RCW 90.58.020 and shall not produce substantial adverse  
27 effects to the shoreline environment.

28 In reaching our conclusions, the Board considers this matter de novo,  
29 and is not bound by the County's having issued a variance to Mr. Huff  
30 in 1979.

## 31 VI

32 The proposal is within the Conservancy Environment. The SMP  
33 defines the Conservancy Environment as:

34 a shoreline area of sparse, scattered settlements,  
35 existing relatively free of urban activity. It is an  
36 area that, because of the biophysical characteristics, is  
37 intolerant of intensive land uses. It is an area used  
38 primarily for diffuse recreation, timber harvesting on a  
39 sustained yield basis, and passive agricultural  
40 practices. SMP at p. 37.



VII

The Board concludes that the hardship in the instant case is very specifically related to the narrow width of the subject lot, to the limited size as confined by the railroad right-of-way to the north and the steep river bank to the south, and yet must further conclude that the applicant's own action in not retaining property above the railroad as part of the subject property has caused this unique set of circumstances, blocking construction.

VIII

WAC 173-14-150(4) requires the consideration whether there would be a cumulative negative impact if additional like requests were granted. In determining what are "like requests", we conclude it would be the construction of residences entirely or predominantly within the 100 foot setback, to within 12 feet of the ordinary high water mark.

Like requests would also have the effect of essentially nullifying the Clark County SMP Residential policies on all setbacks. Residential Development policies call for these setbacks: 35 feet in the Urban Environment, 50 feet in the Rural Environment, and 100 in the Conservancy Environment. SMP at p. 76.

The cumulative impacts would also be inconsistent with the policies of the Shoreline Management Act for Shorelines of Statewide Significance at RCW 90.58.020 (2), by failing to preserve the natural character of the shoreline.

IX

Any Finding of Fact which is deemed to be a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters the following:

ORDER

Clark County's denial of the Wiswalls' shoreline variance permit application is AFFIRMED.

DONE this 28th day of June, 1991.

SHORELINES HEARINGS BOARD

Judith A. Bendor  
JUDITH A. BENDOR, Chair

Harold S. Zimmerman  
HAROLD S. ZIMMERMAN, Presiding

Annette S. McGee  
ANNETTE S. MCGEE, Member

Nancy Burnett  
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MARK ERICKSON, Member

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MARTIN CARTY, Member

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